No. 75-1231

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

JERRY A. TRUITT AND JAMES K. MONTGOMERY, JR.,
PETITIONERS

v.

WILLIAM M. LENAHAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The principal contention presented by the petition is that a search and seizure of petitioners' records by agents of the Internal Revenue Service pursuant to a search warrant violated their Fifth Amendment rights. In this suit brought by petitioners against the agents seeking suppression of any evidence obtained from the records and damages for violation of their constitutional rights, the district court granted summary judgment to the agents of the Internal Revenue Service (Pet. App. B A7-A10) and the court of appeals affirmed (Pet. App. A A1-A6).

The pertinent facts are as follows: Petitioners Truitt and Montgomery are veterinarians. Between September 27, 1968, and March 26, 1973, petitioners practiced in partnership under the name "Animal Hospital" in

Memphis, Tennessee.[1] On September 25, 1972, Martha Jane Greenwood, a former employee if petitioners, called the Internal Revenue Service and stated that petitioners were not reporting all of their income. This information was received by the Intelligence Division of the Internal Revenue Service (R. 35-36, 39).[2] On May 3, 1973, Special Agent Childress of the Intelligence Division was assigned the task of evaluating several items of information, including that supplied by Greenwood, pertaining to petitioners' tax liability. After concluding that the information did not warrant a criminal investigation by the Intelligence Division, Special Agent Childress referred the matter to the Audit Division (R. 40-41). It is undisputed that the Intelligence Division did not control or direct the activities of the revenue agents involved until the case was later returned to the Intelligence Division (Pet. App. A A5-A6, n. 3).

At the commencement of the audit one year later, petitioner Truitt referred Revenue Agent Plunket to Don Holmes, Truitt's accountant. After examining the partnership records for 1971, the revenue agent determined that there was a substantial understatement of income (R. 49-50). On October 11, 1973, Margorie Morris, an employee of petitioner Truitt, approached Revenue Agent Plunket and told him that not all receipts during the year 1971 were deposited in the partnership bank account (R. 51-55). Petitioner Truitt was advised of the understatement of income discovered, and Revenue Agent Plunket asked to

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[1]On March 26, 1973, petitioner Truitt purchased all of his partner's interest in the practice, including all of the partnership records (Pet. 4, n. 1). Since March 26, 1973, petitioner Truitt has practiced veterinary medicine as a sole proprietor.

[2]"R." refers to the record appendix in the court of appeals.

copy the records so that work could be done in Internal Revenue Service offices (R. 50, 51, 55). Truitt was informed that he did not have to allow copying of the records (R. 55). On November 5, 1973, petitioners' accountant Holmes advised Agent Plunket that the records would not be made available for copying. This refusal to turn over the records was repeated by G. Patrick Arnoult, an attorney who was representing petitioners (R. 55-56).

Revenue Agent Plunket thereupon referred the cases of both petitioners to the Intelligence Division as potential fraud cases. Special Agents Cade and Lenahan then proceeded to interview the original informant, Martha Jane Greenwood, and to take a sworn statement from her (R. 60). That statement reaffirmed her original charge that petitioners were not recording and reporting a portion of their cash income (R. 68-70). She also said that both petitioners knew what was being done (R. 72) and added that petitioner Truitt had urged her to refuse to give any information and to deny the knowledge she had (R. 73-74).

The agents thereafter decided to obtain a search warrant to seize petitioners' records. They presented affidavits to a United States Magistrate, setting forth the facts that established probable cause to believe that petitioners had willfully failed to report their true incomes for the years in question. The magistrate issued a warrant to the agents to search for and seize records pertaining to petitioners' 1971 and 1972 tax liabilities (R. 16-18). The search was carried out on April 12, 1974, and various financial records of petitioners were seized (Pet. App. B A7).

1. Petitioners first contend (Pet. 8-9) that the seizure of their books and records violated their Fifth Amendment privilege against compulsory self-incrimination. For the reasons we have set forth in our brief *amicus curiae* in *Andresen* v. *Maryland*, No. 74-1646, argued February 25,

1976,[3] we believe that the court of appeals correctly held that a person's privilege under the Fifth Amendment against being compelled to be a witness against himself cannot be invoked to bar the admission into evidence of business records seized by the Internal Revenue Service in compliance with the Fourth Amendment. See also *Shaffer* v. *Wilson*, 523 F.2d 175 (C.A. 10), petition for a writ of certiorari pending, No. 75-601.

As the Court recently observed in *Fisher* v. *United States*, No. 74-18, decided April 21, 1976, slip op. 7 (footnote omitted), it "has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." The execution of a search warrant does not involve compulsory testimonial self-incrimination. However, since the issue raised here is now before the Court in *Andresen*, the petition should be held pending the decision in that case.

2. Petitioners' remaining claims do not warrant further review. They also contend (Pet. 11) that the search was unreasonable under the Fourth Amendment because the government had no reason to believe that the records would be concealed or destroyed. But as both courts below concluded, if the probable cause and particularity requirements of the Fourth Amendment are otherwise met, the government need not establish that records constituting evidence of a crime are about to be hidden or destroyed before it may search for and seize them

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[3]We are serving a copy of our *Andresen* brief on petitioners together with this memorandum.

pursuant to a warrant (Pet. App. A A4; Pet. App. B A10)[4]

3. Finally, petitioners argue (Pet. 13-15) that the Internal Revenue agents' failure to warn them of their constitutional rights was a violation of the Internal Revenue Service's own announced rules which require its special agents to warn taxpayers of their constitutional rights prior to the initial interview in a criminal investigation. That policy does not extend to the interviews conducted by revenue agents in connection with a civil audit. In apparent acknowledgement that the warnings are only required to be given by special agents in their interviews of taxpayers under criminal investigation, petitioners claim (Pet. 15) that "the IRS deliberately assigned a Revenue Agent to conduct what it most certainly knew to be a criminal investigation" so that the warnings would not be required. There is, however, no evidence that the assignment of this case to a revenue agent was made in anything other than good faith (Pet. App. A A5-A6, n. 3). The courts of appeals that have considered the question all agree that the good faith referral of an audit assignment to a revenue agent who is not required to warn taxpayers of their constitutional rights before interviewing them, instead of to a special agent who is required to give such warnings, does not deny due process. *United States* v. *Robson*, 477 F.2d 13, 17 (C.A. 9), certiorari denied, 420 U.S. 927; *United States* v. *McCorkle*, 511 F.2d 482, 487-489 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 826.

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[4]*VonderAhe* v. *Howland*, 508 F.2d 364 (C.A. 9), upon which petitioners rely (Pet. 7), is not to the contrary. There, the court indicated that a search warrant is proper if a request for the records has been denied. Here, the request to copy the records was denied before the warrant was sought, and the court of appeals held that the criteria set forth in *VonderAhe* had been satisfied (Pet. App. A A4).

For the reasons stated, the petition for a writ of certiorari should be held pending the Court's decision in *Andresen* v. *Maryland, supra.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.